

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Extension of Time to Construct an)	
Industrial/Business Radio Service)	ULS File No. 0000356906
Trunked Station)	
Call Sign WPNZ964)	
)	
)	
)	

Memorandum Opinion and Order

Adopted: October 22, 2003

Released: October 23, 2003

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the petition for reconsideration filed by Hilltop Communications, Inc. (Hilltop).¹ Hilltop seeks reconsideration of a July 29, 2002 letter of the Licensing and Technical Analysis Branch (“the Branch”) of the Commercial Wireless Division dismissing the captioned request for extension of time to construct a trunked station in the Industrial/Business radio service. For the reasons stated below, we deny Hilltop’s petition.

II. BACKGROUND

2. On August 17, 1999, the Commission granted authorization to operate a license in the Industrial/Business Pool, Trunked service (I/B service) in Prescott, Wisconsin, and St. Paul, Lake City, and Cannon Falls, Minnesota, under call sign WPNZ964. The license authorized operation on certain UHF channels, with emissions limited to 6 kHz bandwidth. Pursuant to the Commission’s rules in effect when this license was granted, the Commission required that all stations authorized under Part 90 of the Commission’s rules, with certain exceptions inapplicable to this case, must be placed into operation within eight (8) months from the date of grant.² Moreover, pursuant to relevant rule, the Part 90

¹ Petition for Reconsideration filed August 28, 2002 (Petition).

² See 47 C.F.R. §§ 1.946, 90.155 (1999) (eight month construction period). In the Part 90 Biennial Review Report and Order, the Commission amended its rules to change the time in which a station must be placed in operation from eight months to twelve months. See 1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile radio services WT Docket No. 98-182 RM-9222 Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing them PR Docket No. 92-235 and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 16673, ¶ 12 (2000). This change became effective in November 2000.

authorization is cancelled automatically if the construction and operation deadlines are not met, unless an extension of time is granted.³ Accordingly, station WPNZ964 was required to be operational by April 17, 2000.

3. Claiming that it was unable to obtain mobile equipment in order to construct its system in accord with Commission rules, and thus in danger of having its license automatically cancel, Hilltop filed, on October 20, 1999 a request for Special Temporary Authority (STA) to operate its system with 11.25 kHz of bandwidth until such time as mobile equipment became commercially available. On October 26, 1999, the Branch released a letter denying Hilltop's STA request.⁴

4. On February 2, 2001, Hilltop filed the above captioned Request for Extension of Time to Construct an Industrial/Business Radio Service Trunked Station, Call Sign WPNZ964 (Extension Request), asking that the construction deadline be extended for over three years (i.e., from April 17, 2000 to December 1, 2003).⁵ On August 20, 2001, Hilltop filed two waiver requests that were associated with the Extension Request. In the first waiver request, Hilltop requested a waiver of the Commission's rules to the extent it was necessary to allow the Commission to act on the Extension Request given that the construction deadline had already passed. In the second waiver request, Hilltop requested a waiver of section 90.155(a) of the Commission's rules, to extend the construction deadline.

5. On July 29, 2002, the Branch released a letter dismissing the Extension Request and its associated waiver requests.⁶ In its Petition, Hilltop contends that at the time it filed its application, no UHF mobile equipment was commercially available for 6 kHz bandwidth emissions.⁷ Contending that it could not construct its licensed system in accord with Commission rules without UHF mobile equipment, Hilltop filed its Extension Request⁸ arguing that the Letter Decision is arbitrary and capricious because the Wireless Telecommunications Bureau (WTB) has granted extensions of construction deadlines to others in the past.⁹ Hilltop claims that WTB's earlier grants of extensions required no proof beyond the verified statements in the extension requests themselves and that WTB requires a higher standard of proof from Hilltop than from other applicants. Specifically, Hilltop contends that both FCI 900, Inc. and Neoworld License Holdings, Inc. applied for and were granted extensions of their construction deadlines due to the alleged absence of 900 MHz equipment. Hilltop asserts that, by dismissing its request, WTB has imposed on it an unreasonable standard of proof to justify its Extension Request.¹⁰

III. DISCUSSION

6. In reviewing the Branch's decision to dismiss the Extension Request, we first address the timeliness of the Extension Request and its associated waiver requests. Section 1.946(e) of the Commission's rules states that a request for extension must be filed before the expiration of the

³ See 47 C.F.R. §§ 1.946, 1.955, 90.155(c).

⁴ See Letter from Wanda P. Grothen, Commercial Wireless Division, Wireless Telecommunications Bureau, to Hilltop Communications, Inc., dated October 26, 1999.

⁵ ULS File No. 0000356906.

⁶ See Letter from Ronald B. Fuhrman, Commercial Wireless Division, Wireless Telecommunications Bureau, to Benjamin J. Aron, Counsel for Hilltop Communications, Inc., dated July 29, 2002 ("Letter Decision").

⁷ Petition at 1.

⁸ Petition at 2.

⁹ Petition at 2-3.

¹⁰ Petition at 3 and 5.

construction period.¹¹ In the instant case, the Branch found that the Extension Request was filed nearly ten months after the construction deadline of April 17, 2000. Based on the record, the Branch found that the license for Station WPNZ964 cancelled automatically for failure to construct.¹² Because Station WPNZ964 automatically cancelled for failure to construct, approximately ten months before Hilltop filed its Extension Request, the Branch dismissed the Extension Request as moot. We agree with the Branch's analysis and find nothing in the record or in the Petition that would cause us to reverse the Branch's decision. Moreover, because the license automatically cancelled approximately 16 months before the waiver requests were filed, we likewise agree with the Branch's decision to dismiss those requests as moot.¹³ Unlike the applications filed by FCI 900, Inc. and Neoworld License Holdings, Inc. (Neoworld), Hilltop filed its Extension Request after the construction deadline had past.¹⁴ The Branch never had to reach the merits of Hilltop's arguments because its Extension Request was clearly untimely filed.

7. Furthermore, even had the Extension Request and associated waiver requests been timely, we find no basis in the record for extending or waiving the construction deadline for Station WPNZ964. A party seeking waiver of a Commission rule must show that "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest"¹⁵ Alternatively, a party must show that "[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative."¹⁶ When seeking to deviate from the general rule, an applicant faces a heavy burden.¹⁷ In order to obtain a waiver, an applicant must plead with particularity the facts and circumstances which warrant such action.¹⁸

8. Hilltop argues that it could not comply with the Section 90.155(a) because no mobile equipment was available that complied with a condition placed on this license.¹⁹ We find this reason alone, however, is insufficient to allow Hilltop to hold the spectrum until equipment finally becomes available. Significantly, Hilltop provides no information as to how long it may take for equipment to become available. Without some idea of when equipment will become available, we cannot even be sure that grant of a limited waiver in this case will provide relief to Hilltop. Finally, we disagree with

¹¹ 47 C.F.R. § 1.946(e).

¹² See 47 C.F.R. § 1.955(a)(2). See also Midport Electronics, Inc., et. Al., Order, DA 02-1722, ¶ 8 (PSPWD WTB rel. Jul. 17, 2002).

¹³ See Daniel R. Goodman, Receiver; Dr. Robert Chan, Memorandum Opinion and Order and Order on Reconsideration, 13 FCC Rcd. 21944, 21972 n. 185 (1998) (licensees seeking an extension of time to construct must file their waiver request prior to the cancellation of its license because the license cancels at the end of the original construction deadline).

¹⁴ See In the Matter of FCI 900, Inc. Expedited Request for 3-year Extension of 900 MHz Band Construction Requirements and Neoworld License Holdings, Inc. Request for Waiver of 900 MHz Band Construction Requirements and Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (WTB 2001) (*FCI 900/Neoworld Order*).

¹⁵ 47 C.F.R. § 1.925(b)(3)(i).

¹⁶ 47 C.F.R. § 1.925(b)(3)(ii).

¹⁷ See *WAIT Radio v. FCC*, 418 F.2d 1153 (1969).

¹⁸ *Id.*

¹⁹ Specifically, Hilltop states that Station WPNZ964 was authorized for a transmission bandwidth of 6.25 KHz, but that it was not able to find mobile units designed to receive a 6.25 kHz bandwidth signal. Despite Hilltop having constructed base stations, the station is not deemed "operational" under Commission rules unless at least one mobile station is placed into operation as well. See 47 C.F.R. 90.155(c).

Hilltop's assertion that it is similarly situated to FCI 900, Inc. and Neoworld. FCI 900 Inc. and Neoworld were granted relief in order to allow time for digital equipment to become available.²⁰ Unlike Hilltop's situation, FCI 900, Inc. provided assurances from an equipment manufacturer that digital equipment would be available shortly, even though only analog (but not digital) equipment was available at that time. In contrast, Hilltop provides no plan for obtaining equipment and no certainty of when, if ever, equipment will be available to meet their needs.

IV. ORDERING CLAUSE

9. ACCORDINGLY, IT IS ORDERED, THAT the petition for reconsideration filed by Hilltop Communications, Inc. seeking reconsideration of the Licensing and Technical Analysis Branch's letter of July 29, 2002, dismissing Hilltop's request for an extension of time to construct an Industrial/Business Radio Service Trunked Station, Call Sign WPNZ964, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel
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²⁰ See *FCI 900/Neoworld Order*, 16 FCC Rcd at 11074-76, ¶¶ 4-5.